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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 538.

CHARLES KERN, PLAINTIFF IN ERROR,

vs.

FREDERICK W. HUIDEKOPER, JOHN N. DENNISON, AND THOMAS W. SHANNON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 30, 1879.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Thursday, the twenty-first day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY,
Clerk.

FREDERICK W. HUIDEKOPER, JOHN N. DENNISON, and THOMAS W. SHANNON
v.
CHARLES KERN. } Replevin.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the twenty-seventh day of July, A. D. 1877, came the said plaintiffs, by Messrs. Crawford and McConnell, their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, their bond for costs and a transcript of the record of
2 the proceedings had in the circuit court of Cook County, in the State of Illinois, in said-entitled cause, which said bond for costs and transcript are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, July term, A. D. 1877.

F. W. HUIDEKOPER ET AL.
v.
CHARLES KERN.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against my property for any costs taxed against them. Dated this 27th day of July, A. D. 1877.

S. P. McCONNELL.

(Endorsed:) Filed July 27th, A. D. 1877. Wm. H. Bradley, clerk.

Transcript of record of proceedings in circuit court of Cook County, State of Illinois.

3 UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Pleas before the honorable W. K. McAllister, one of the judges of the circuit court of Cook County, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 18th day) of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

Present: The honorable W. K. McAllister, one of the judges of the circuit court of Cook County, State of Illinois; L. L. Mills, State's attorney; Charles Kern, sheriff.

Attest:

JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 23d day of May, A. D. 1877, the same being one of the days of the May term aforesaid, there was filed in said court a certain affidavit for replevin, and thereupon there issued out of said court, under the seal thereof, the people's writ of replevin, directed to the coroner of Cook County to execute, which said affidavit and writ, with the coroner's return thereon endorsed, are in the words and figures following, to wit:

4 *Affidavit for replevin.*

STATE OF ILLINOIS,
Cook County, ss:

Frederick W. Huidekoper, being duly sworn, doth depose and say that the plaintiffs, Frederick W. Huidekoper, John N. Dennison, and Thomas W. Shannon are the owners of, and are now lawfully entitled to, the possession of the following goods and chattels, viz, about one thousand (1,000) tons of railroad iron formerly in the track of the Chicago, Danville & Vincennes Railroad, now lying along what is called the Mud Lake track, near Twenty-fourth street, in the city of Chicago, Illinois, and that said goods and chattels are of the value of eighteen thousand dollars. That on the 9th day of May, A. D. 1877, the defendant, Charles Kern, wrongfully took and now wrongfully detains the said goods and chattles from the said Frederick W. Huidekoper, John N. Dennison, and Thomas W. Shannon, and the said goods and chattels have not been taken for any tax assessment or fine levied by virtue of any law of this State, nor seized under any execution or attachment against the goods and chattels of the said Frederick W. Huidekoper, John N. Dennison, and Thomas W. Shannon, or either of them, liable to execution or attachment, nor held by virtue of any writ of replevin against them or either of them.

F. W. HUIDEKOPER.

Subscribed and sworn to before me this twenty-second day of May, A. D. 1877.

[NOTARIAL SEAL.] GEO. F. BIDWELL,
Notary Public.

Replivin writ.

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to the coroner of Cook County, greeting:

5 Whereas Frederick W. Huidekoper, John N. Dennison, and Thomas W. Shannon, plaintiffs, complain that Charles Kern, defendant, unlawfully and wrongfully has taken and does detain the following described goods and chattels, to wit, about one thousand (1,000) tons of railroad iron, formerly in the track of the Chicago, Danville & Vin-

cennes Railroad, now lying along what is called the Mud Lake track, near Twenty-fourth street, in the city of Chicago, Illinois, to the value of eighteen thousand dollars:

Therefore we command you that if the said plaintiffs shall give you bond with good and sufficient security in double the value of the said good and chattels, as required by law, to prosecute their suit in this behalf to effect and without delay, and to make return of the said goods and chattels if return thereof shall be awarded, and to save and keep you harmless in replevying said goods and chattels, you cause the said goods and chattels to be replevied and delivered to said plaintiffs without delay; and also that you summon the said defendant to be and appear before the circuit court of Cook County, on the first day of the next term thereof, to be holden at the court house, in the city of Chicago, in said county, on the third Monday of June next, to answer said plaintiffs in the premises.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same, together with the bond which you shall have taken from the said plaintiffs, as before commanded, before executing this writ.

Witness Jacob Gross, clerk of said court, and the seal thereof, at Chicago, in said county, this 23d day of May, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

Endorsement.

The plaintiffs given bond as hereto annexed. I have taken the within described property and delivered the same to the said plaintiffs, as per receipt hereon endorsed; also served this writ on the within named defendant, by reading the same to him, the 23d day of May, A. D. 1877.

EMIL DIETZSCH, *Coroner.*
By GUSTAV A. KORN, *Deputy.*

Receipt.

Received of Emil Dietzsch, coroner of Cook County, the within described property, this 23d day of May, 1877.

EDMUND DU BARRY.
For HUIDEKOPER, SHANNON & DENNISON.

And thereupon, afterwards, to wit, on the 31st day of May, A. D. 1877, there was filed in said court a certain bond and petition to remove action from circuit court of Cook County to the United States circuit court for the northern district of Illinois, in the words and figures following, to wit:

Bond to accompany petition for removal.

Know all men by these presents that we, F. W. Huidekoper, John N. Dennison, and Thomas W. Shannon, as principals, and A. B. Meeker, surety, are held and firmly bound unto Charles Kern in the penal sum of one thousand dollars, lawful money of the United States, for the payof which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 29th day of May, 1877.

The condition of the above obligation is such that, whereas Frederick

W. Huidekoper, Thomas W. Shannon, and John M. Dennison instituted a suit at law in the circuit court of Cook County, Illinois, on the 23d day of May, A. D. 1877, and which is still pending therein, in which suit Frederick W. Huidekoper, Thomas W. Shannon, and John M. Dennison were plaintiffs, and Charles Kern defendant, and whereas the said Frederick W. Huidekoper, Thomas W. Shannon, and John M. Dennison desire to remove the said suit to the United States circuit court for the northern district of Illinois, and have filed their petition in the said circuit court of Cook County, Illinois, for such removal:

Now, therefore, if the said petitioners shall enter a copy of the record in said suit in the United States circuit court for the northern district of Illinois, at or before its next ensuing session, and shall pay all costs which the said circuit court of the United States for the northern district of Illinois shall award against the said petitioners, in case the said circuit court of the United States shall determine that the said suit was wrongfully and improperly removed thereto, then this obligation to be null and void, otherwise to remain in full force and effect.

F. W. HUIDEKOPER. [SEAL.]
JOHN N. DENNISON. [SEAL.]
THOMAS W. SHANNON. [SEAL.]
By F. W. HUIDEKOPER, *Atty.*
A. B. MEEKER. [SEAL.]

Petition.

In the circuit court of Cook County, June term, A. D. 1877.

STATE OF ILLINOIS,
County of Cook, ss:

FREDERICK W. HUIDEKOPER, THOMAS W. Shannon, and John N. Denison *vs.* CHARLES KERN, SHERIFF OF COOK COUNTY. } Replevin.

To the honorable judges of the circuit court of Cook County:

Your petitioners, Frederic W. Huidekoper, Thomas W. Shannon, and John N. Denison, respectfully show unto your honors that the amount involved in the above entitled cause exceeds the sum of five hundred dollars, exclusive of all costs; that no trial has as yet been had in said cause, and that no trial could have been had thereof before the present term of this court, and that the said suit involves a controversy between citizens of different States, and can be wholly determined as between them.

Your petitioners further show unto your honors that your petitioner Frederic W. Huidekoper is now, and at the institution of this action was, a citizen of the State of Pennsylvania. That your petitioner Thomas W. Shannon is now, and at the institution of this action was, a citizen of the State of New York. That your petitioner John M. Denison is now, and at the institution of this action was, a citizen of the State of Maryland. And that the defendant Charles Kern is a citizen of the State of Illinois, and was such citizen at the institution of this action.

Your petioners, tendering bond with good and sufficient sureties, conditioned as required by law, pray that the said suit may be transferred into the court of the United States for the northern district of Illinois.

Your petitioners therefore pray that the said action may be trans-

ferred to the circuit court of the United States for the northern district of Illinois, and for all further proper relief.

L. W. HUIDEKOPER AND OTHERS,
Plaintiffs.

9 And thereupon, afterwards, to wit, on the 2nd day of June, A. D. 1877, there was filed in said court a certain replevin bond, and certain proceedings were had and entered of record in said cause, which said bond and proceedings are in the words and figures following, to wit:

Replevin bond.

Know all men by these presents that we, Frederic W. Huidekoper, John N. Dennison, Thomas W. Shannon, Arthur B. Meeker, and John B. Drake, are held and firmly bound unto , of the county of Cook, in the State of Illinois, and to his successors in office, executors and administrators and assigns, in the penal sum of thirty-six thousand dollars, lawful money of the United States of America, for the payment of which sum we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that, whereas on the twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy seven, the said Frederick W. Huidekoper, John N. Dennison, and Thomas W. Shannon sued out of the circuit court of Cook County aforesaid a writ of replevin against Charles Kern, defendant, for the recovery of the following described goods and chattels, to wit,

about one thousand (1,000) tons of railroad iron formerly in the
10 track of the Chicago, Danville and Vincennes Railroad, now lying along what is called the Mud Lake track, near Twenty-fourth street, in the city of Chicago, Ill.

Now, if the said Frederic W. Huidekoper, John N. Dennison and Thomas W. Shannon, plaintiffs, shall prosecute such suit to effect, and without delay, and make return of said property, if return thereof shall be awarded, and save and keep harmless the said coroner in replevying the said property, viz, said 1,000 tons of railroad iron, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 22nd day of May, A. D. 1877.

F. W. HUIDEKOPER. [SEAL.]
T. W. SHANNON. [SEAL.]
J. M. DENNISON, [SEAL.]
By F. W. HUIDEKOPER.
A. B. MEEKER. [SEAL.]
JOHN B. DRAKE. [SEAL.]

Taken and approved by me this 24th day of May, A. D. 1877.

GUSTAV KORN,
Deputy Coroner.

Order, June 2nd.

FREDERICK W. HUIDEKOPER, JOHN N. DENNISON, and Thomas W. Shannon
vs.
CHARLES KERN.
} 24729, 8233. Replevin.

11 This day came the said plaintiffs, by their attorneys, and present and file their petition for the transferring of said cause into the United States circuit court for the northern district of the State of

Illinois, and the court, after being fully advised in the premises, doth deny said petition on the ground that it was prematurely presented and filed.

And thereupon afterwards, to wit, on the 30th day of June, A. D. 1877, the same being one of the days of the June term, the following proceedings were had and entered of record in said court in words and figures following, to wit:

Order, June 30, 1877.

FREDERICK W. HUIDEKOPER ET AL.
v.
CHARLES KERN. } 24729, 8233. Replevin.

This day came the said plaintiffs by their attorney, and moved the court to transfer said cause to the United States circuit court for the northern district of Illinois, and thereupon the court continues said motion for hearing until Monday next.

And thereupon afterwards, to wit, on the 30th day of June, A. D. 1877, there was filed in said cause a certain declaration in replevin, in words and figures following, to wit:

Narr. in replevin.

12 In the circuit court of Cook County. June term, 1877.

STATE OF ILLINOIS,
County of Cook, ss:

Charles Kern was summoned to answer Frederick W. Huidekoper, Thomas W. Shannon and John M. Denison, of a plea whereof he took the goods and chattels of the said plaintiffs and wrongfully detained the same until, etc.

And thereupon the said plaintiffs, by Crawford and McConnell, attorneys, complain:

For that the said defendant, on the first day of May, in the year 1877, at the city of Chicago, in the county aforesaid, wrongfully took the goods and chattels, to wit, about one thousand (1,000) tons of railroad iron formerly in the track of the Chicago, Danville and Vincennes Railroad, now lying along what is called the Mud Lake track, near Twenty-fourth street, in the city of Chicago, Illinois, of the said plaintiffs, of the value of eighteen thousand dollars, and wrongfully detained the same until, etc.

And also wherefore the said defendant wrongfully detained the goods and chattels of the said plaintiffs, until, etc., for that the said defendant on the first day of May, in the year 1877, in the county aforesaid, other

13 the goods and chattels of the said plaintiffs, to wit, about one thousand (1,000) tons of railroad iron formerly in the track of the Chicago, Danville and Vincennes Railroad, now lying along what is called the Mud Lake track, near Twenty-fourth street, in the city of Chicago, Illinois, of the value of eighteen thousand dollars, wrongfully detained, until, etc.

And also for that whereas the said plaintiffs, on the day last aforesaid,

in the county aforesaid, were lawfully possessed as of their own property of certain other goods and chattels, to wit, of the value of dollars; and being so possessed thereof, the said plaintiff, afterwards, to wit, on the same day there casually lost the last mentioned goods and chattels out of their possession; and the same afterwards, to wit, on the same day there came to the possession of the said defendant by finding; yet the said defendant well knowing the last mentioned goods and chattels to be the property of the said plaintiff, has not as yet delivered the same or any or either of them, or any part thereof, to the said plaintiff, though often thereto requested, but has hitherto refused so to do; and afterwards, to wit, on the same day, there converted and disposed of the last-mentioned goods and chattels to his own use.

Wherefore the said plaintiffs say that they are injured and have sustained damage to the amount of eighteen thousand dollars; and therefore they bring their suit, etc.

14 CRAWFORD AND McCONNELL,
Plaintiffs' Attorneys.

And thereupon afterwards, to wit, on the 6th day of July, A. D. 1877, there was filed in said cause a certain plea, petition for removal of cause to United States circuit court, and bond, and certain proceedings were had and entered of record in said cause, which said plea, petition, bond, and proceedings are in the words and figures following, to wit:

Plea.

In the circuit court of Cook County, Ills.

F. W. HUIDEKOPER ET AL.
v.
CHARLES KERN. } 24729. Replevin.

And the defendant Charles Kern, by E. Walker, his attorney, comes and defends the wrong and injury, when, &c., and says that the plaintiffs ought not to have their aforesaid action against him, the defendant, because he says that the Bank of North America, before the said time, when, &c., to wit, on the 8th day of March, A. D. 1877, sued out of the superior court of Cook County aforesaid a certain writ of fieri facias of that date against the Chicago, Danville and Vincennes Railroad Company, directed to the sheriff of Cook County aforesaid, and because one John McCaffrey before the said time, when, &c., to wit, on the

15 eighth day of May, 1877, sued out of the superior court of Cook County aforesaid another certain writ of fieri facias of that date against the said Chicago, Danville and Vincennes Railroad, directed to the said sheriff of said county, by which said writs the people of the State of Illinois commanded such sheriff that of the goods and chattels, lands and tenements in his county of the said Chicago, Danville and Vincennes Railroad Company he should cause to be made the sum of eight thousand four hundred fourteen and $\frac{67}{100}$ dollars damages, and the sum of seven dollars costs of suit, on the said writ issued by the said Bank of North America, and that he should cause to be made the further sum of three thousand three hundred thirty-three and $\frac{10}{100}$ dollars damages and the sum of seven dollars costs of suit on the said writ issued by the said John McCaffrey, which, by the consideration of the said courts, on the days aforesaid, the said Bank of North America and John McCaffery recovered against the said Chicago, Danville and Vincennes

Railroad Company, together with interest on said sums, at the rate of six per cent. per annum from the time of recovering the same as aforesaid, and also the further sum of dollars accruing costs on the said judgments; and that such sheriff should have the said moneys ready to render to the said Bank of North America and John McCaffery according to law, and should make return of the said writs in
16 ninety days after the said respective dates thereof; which said writs were thereupon, on the said days of the respective dates thereof, there delivered to the defendant, who then and from thenceforth until, and at and after the said time, when, &c., was sheriff of the county aforesaid, to be executed in due form of law (copies of which said writs are hereto attached and asked to be made a part of this plea), by virtue of which said writs the defendant as such sheriff as aforesaid, afterwards, and before the return day of said writs, to wit, on the 9th and 10th days of May, A. D. 1877 (and the said writs being then in full force and unsatisfied), there took the said goods and chattels in the said declaration mentioned, and detained the same, in execution of the said writs; which are the same takings and detentions in the said declaration above supposed, &c.

And the defendant further says that the said goods and chattels in the said declaration mentioned at the said times when, &c., were the property of the said Chicago, Danville and Vincennes Railroad Company, and not of the plaintiffs, as by the said declaration is above supposed, and were subject to execution, to wit, in the county aforesaid; and this defendant is ready to verify, wherefore he prays judgment, &c.

CHARLES KERN.
By E. WALKER,
His Att'y.

17 By virtue of the annexed al's writ of execution, No. 33630, issued from the Superior court of Cook County, in favor of The Bank of North America, plaintiffs, against the Chicago, Danville and Vincennes Railroad Company, defendants, I did, on the 9th day of May, 1877, levy upon all the right, title and interest of the within named defendants in and to the following described property, to wit, about 1,000 tons or more of old railroad iron lying on the side track known as the H. F. Eames track, situated between Ashland ave. and Leavitt street, in the city of Chicago, in Cook County, Illinois, said track being and running parallel with Blue Island ave.

CHARLES KERN,
Sheriff.
By LEWIS BARTELS,
Deputy.

(Copy.)

STATE OF ILLINOIS,
Cook County, ss:

The people of the State of Illinois, to the Sheriff of said county, greeting:

We command you that of the lands and tenements, goods and chattels of the Chicago, Danville and Vincennes Railroad Company, defendant, in your county, you cause to be made the sum of eighty-four hundred and fourteen dollars and sixty-seven cents, which The Bank of North America, plaintiff, lately in the superior court of Cook

County, at a term thereof begun and held at Chicago, in said
18 Cook County, on the first Monday of October, A. D. 1874, recovered against the said defendant, and which, by the said court, was adjudged to the said plaintiff, for its damages, and also the further sum of seven dollars, which was adjudged to the said plaintiff for its costs and charges in that behalf expended, whereof the said defendant is convicted, as appears to us of record.

And have you these moneys ready to render to the said plaintiff for its damages and costs aforesaid, and make a return of said writ, with an endorsement thereon, in what manner you shall have executed the same, in ninety days from the date thereof.

Witness, John J. Healy, clerk of our said court, and the seal thereof at the city of Chicago, in said county, this 8th day of March, A. D. 1877.

[SEAL.] JNO. J. HEALEY, *Clerk.*

By virtue of the annexed writ of execution, No. 34163, issued from the superior court of Cook County, in favor of John McCaffery, plaintiff, and against the Chicago, Danville and Vincennes Railroad Company, defendants, I did, on the 10th day of May, 1877, levy upon all the right, title and interest of the within named defendants in and to the following described property, to wit, about 1,000 tons or
19 more of old railroad iron lying on the side of a track known as the H. F. Eames track, situated between Ashland ave. and Leavitt street, in the city of Chicago, in Cook County, Illinois, said track lying and running parallel with Blue Island ave.

This levy is subject to a levy under another execution, issued from the superior court, in favor of The Bank of North America, plaintiff, and against the Chicago, Danville and Vincennes Railroad Company, defendants.

CHARLES KERN,
Sheriff.
By LEWIS BARTELS,
Deputy.

(Copy.)

STATE OF ILLINOIS,
Cook County, ss:

The people of the State of Illinois, to the Sheriff of said county, greeting:

We command you that of the lands and tenements, goods and chattels of the Chicago, Danville and Vincennes Railroad Company, defendant, in your county, you cause to be made the sum of thirty-three hundred and thirty-three dollars and forty cents, which John McCaffery, plaintiff, lately in the superior court of Cook County, at a term thereof begun and held at Chicago, in said county, on the first Monday of May, instant, recovered against the said defendant, and which, by the said court, was adjudged to the said plaintiff for his dam-
20 ages; and also the further sum of seven dollars, which was adjudged to the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant is convicted, as appears to us of record.

And have you these moneys ready to render to the said plaintiff for his damages and costs aforesaid, and make a return of said writ, with

an endorsement thereon, in what manner you shall have executed the same, in ninety days from the date hereof.

Witness John J. Healy, clerk of our said court, and the seal thereof, at the city of Chicago, in said county, this 8th day of May A. D. 1877,

[SEAL.] JOHN J. HEALEY, *Clerk.*

Bond to accompany petition for removal.

Know all men by these presents that we, F. W. Huidekoper, John N. Dennison, and Thomas W. Shannon, as principals, and A. B. Meeker, as surety, are held and firmly bound unto Charles Kern in the penal sum of one thousand dollars lawful money of the United States, for the payment of which said sum well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and
21 severally by these presents. Sealed with our seals, and dated this 29th day of May, 1877.

The condition of the above obligation is such that, whereas Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison instituted a suit at law in the circuit court of Cook County, Illinois, on the 23d day of May, A. D. 1877, and which is still pending therein, in which suit Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison were plaintiffs, and Charles Kern defendant, and whereas the said Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison desire to remove the said suit to the United States circuit court for the northern district of Illinois, and have filed their petition in the said circuit court of Cook County, Illinois, for such removal:

Now, therefore, if the said petitioners shall enter a copy of the record in said suit in the United States circuit court for the northern district of Illinois at or before the next ensuing session, and shall pay all costs which the said circuit court of the United States for the northern district of Illinois shall award against the said petitioners in case the said circuit court of the United States shall determine that the said was wrongfully and improperly removed thereto, then this obligation to be null and void, otherwise to remain in full force and effect.

F. W. HUIDEKOPER. [SEAL.]

22 JOHN M. DENISON AND [SEAL.]
THOMAS W. SHANNON. [SEAL.]
By F. W. HUIDEKOPER, *Att'y.* [SEAL.]
A. B. MEEKER. [SEAL.]

Petition.

STATE OF ILLINOIS,
County of Cook:

In the circuit court of Cook County. June term, A. D. 1877.

FREDERIC W. HUIDEKOPER, THOMAS W. Shannon, and John M. Denison
vs.
CHARLES KERN, SHERIFF OF COOK COUNTY. } Replevin.

To the honorable judges of the circuit court of Cook County:

Your petitioners, Frederic W. Huidekoper, Thomas W. Shannon,

and John M. Denison, respectfully show unto your honors that the amount involved in the above-entitled cause exceeds the sum of five hundred dollars, exclusive of all costs; that no trial has as yet been had in said cause, and that no trial could have been had thereof before the present term of this court, and that the said suit involves a controversy between citizens of different States, and can be wholly determined as between them.

23 Your petitioners further show unto your honors that your petitioner Frederic W. Huidekóper is now, and at the institution of this action was, a citizen of the State of Pennsylvania; that your petitioner Thomas W. Shannon is now, and at the institution of this action was, a citizen of the State of New York; that your petitioner John M. Denison is now, and at the institution of this action was, a citizen of the State of Maryland, and that the sole defendant, Charles Kern, is a citizen of the State of Illinois, and was such citizen at the institution of this action.

Your petitioners, tendering bond with good and sufficient sureties, conditioned as required by law, pray that the said suit may be transferred into the circuit court of the United States for the northern district of Illinois.

Your petitioners, therefore, pray that the said action may be transferred to the circuit court of the United States for the northern district of Illinois and for all further proper relief.

F. W. HUIDEKOPER AND OTHERS,
Plaintiffs.

Order, July 6, 1877.

FREDERIC W. HUIDEKOPER, JOHN N. DENNISON, and THOMAS W. SHANNON v. CHARLES KERN.	24729, 8233.	Replevin.

24 On motion of said plaintiffs, by their attorney, it is ordered by the court that the petition filed herein on the 31st day of May, 1877, be, and it hereby is, dismissed out of this court; and thereupon the said plaintiffs, Frederick W. Huidekoper, John N. Dennison, and Thomas W. Shannon, present their joint petition for the transferring of said cause into the United States circuit court for the northern district of Illinois, and offer as security a bond signed by each of them, and A. B. Meeker, as surety, in the penal sum of one thousand dollars, conditioned according to law, and the court, after hearing arguments of counsel thereon, and being fully advised in the premises, doth deny said petition.

To the refusal of the court to grant said petition the said plaintiffs by their attorney now here except.

STATE OF ILLINOIS.
County of Cook, ss:

I, Jacob Gross, clerk of the circuit court of Cook County, and the keeper of the records and files thereof in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of all papers filed, and proceedings had, and entered of record in a certain cause pending in said court on the common law side thereof between F. W. Huidekoper et al., plaintiffs, and Charles Kern, defendant.

25 In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this seventh day of July, 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:) Filed July 27, 1877. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 14th day of November, A. D. 1877, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

FREDERICK W. HUIDEKOPER } Replevin.
v.
CHARLES KERN. }

On motion of Crawford and McConnell, attorneys, it is ordered that the filing of the record herein on the twenty-seventh day of July last be, and the same is, hereby approved.

Afterwards, to wit, on the 5th day of June, A. D. 1878, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. John M. Harlan, one of the
26 justices of the Supreme Court of the United States, is the following entry, to wit:

F. W. HUIDEKOPER ET AL. }
vs.
CHARLES KERN. }

This day came the plaintiffs and filed herein a written notice to the defendant that they would move this court in this case to enter an order declaring that this case has been removed from the circuit court of Cook County, Illinois, and that this court has exclusive jurisdiction by reason of said removal, and that this cause be placed upon the trial calendar of this court, or for such other order as may be necessary to fully declare the exclusive jurisdiction of this court over said cause. Upon inspection of the transcript filed in the clerk's office on the twenty-seventh day of July, A. D. 1877, it is considered the petition and bond therein filed by plaintiffs for the removal of this suit for trial into this court is in accordance with the act of Congress, and that upon the filing of said transcript in this court with the approval of this court, as shown by order herein of the fourteenth day of November, A. D. 1877, this court acquired jurisdiction of said suit, and the motion of plaintiffs that this suit, by order of court, be placed upon the trial calendar of this court is sustained; to all which the defendant by his attorney excepts. The defendant has leave at any time during the present term of this court upon notice to move to remand this cause to the State court.

27 Afterwards, to wit, on the 26th day of June, A. D. 1878, said plaintiffs, by their attorneys, filed in said clerk's office their replication in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

Circuit court of the United States, northern district of Illinois, July term, A. D. 1878.

F. W. HUIDEKOPER, THOMAS W. SHANNON, AND John M. Denison
v.
CHARLES KERN.
} Replevin.

And the plaintiffs, as to the plea of the defendant by him above pleaded, say that they, the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that the said goods and chattels in the said declaration mentioned at the said time when, etc., were the property of the plaintiff, and not of the said Chicago, Danville and Vincennes Railroad Company, as the defendant has above, in that plea, alleged, and this the plaintiffs pray may be enquired of by the country, etc.

H. CRAWFORD,
Att'y for Plaintiff.

(Endorsed:) Filed June 26, 1878. Wm. H. Bradley, cl'k.

28 On the same day, to wit, the 26th day of June, A. D. 1878, said defendant, by his attorney, filed in said clerk's office his motion to dismiss said entitled cause, which said motion is in the words and figures following, to wit:

Motion to dismiss.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

FREDERICK W. HUIDEKOPER, JOHN N. DENnison, and Thomas W. Shannon,
v.
CHARLES KERN.
} Replevin.

Comes the defendant by E. Walker, his attorney, who enters a special appearance for the defendant for the purpose of this motion and for no other purpose, and moves the court to strike said cause from the trial calendar for the following cause, to wit:

Said defendant has not been brought into this court by order or any writ or process of court, nor has he entered his voluntary appearance to said action in this court.

And the said defendant, under the like special appearance, moves to dismiss said action for the following causes, to wit:

1st. For that said court has no jurisdiction of the subject-matter of said action.

2nd. For that said cause of action is in rem and it is shown by
29 the records that the res at the time of filing said transcript was and ever since has been in the custody and under the control of the circuit court of Cook County, Illinois.

3rd. For that the said plaintiffs, after filing their said petition in said State court, waived their pretended right to removal by voluntarily appearing in said State court and accepting its jurisdiction and asking its judgment, viz, by appearing in said court on the first day of June, A. D. 1878, and filing their replication in said cause; by again appearing in said State court on said last named day and filing their certain petition and motion and praying judgment of said State court thereon on the third day of June, 1878, and filing their exceptions to said judgment.

By again appearing on said third day of June and entering upon the trial of said cause.

By continuing in the trial of said cause until the 5th day of June and then accepting of the judgment of said State court therein.

4th. For that the said plaintiffs have, since the filing of said transcript, prosecuted their said action to judgment in said State court.

E. WALKER,
Att'y for Def't.

(Endorsed:) Filed June 26, 1878. Wm. H. Bradley, cl'k.

30 Afterwards, to wit, on the first day of July, A. D. 1878, in the July term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

F. W. HUIDEKOPER ET AL.
v.
CHARLES KERN.

Now come the parties by their attorneys, and on motion of the plaintiffs by Henry Crawford, esq., their attorney, leave is given them to file another copy of the record from the State court, and the defendant by E. Walker, esq, his attorney, moves to remand this cause.

Afterwards, to wit, on the 3rd day of July, A. D. 1878, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

FREDERICK W. HUIDEKOPER ET AL.
v. } Replevin.
CHARLES KERN.

The court having considered and being now sufficiently advised upon the motion of the defendant filed herein on the twenty-sixth day of June last to dismiss this cause for want of jurisdiction, overrules the same.

31 And on the same day, to wit, the 3rd day of July, A. D. 1877, in the said July term of said court, in the record and proceedings thereof in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

FREDERICK W. HUIDEKOPER ET AL.
v.
CHARLES KERN.

The court having considered and being now sufficiently advised upon

the motion of the defendant heretofore entered herein to remand this cause, overrules the same, to which the defendant by his attorney excepts.

Afterwards, to wit, on the 12th day of November, A. D. 1878, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

FREDERICK W. HUIDEKOPER
v.
CHARLES KERN. } Replevin.

Now come the parties by their attorneys, and the defendant by his attorney moves the court for leave to file a plea to the jurisdiction, and after hearing the arguments of counsel the court sustains said motion and grants the defendant leave to file a plea to the jurisdiction.

32 And on the same day, to wit, the 12th day of November, A. D. 1878, said defendant, by his solicitor, filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

In the circuit court of the United States, northern district of Illinois.

CHARLES KERN
ats.
FREDERICK W. HUIDEKOPER ET AL.

The defendant, by E. Walker his attorney, comes and prays judgment of the said record herein filed, because he says that the plaintiffs first instituted their said action of replevin in the circuit court of Cook County, in the State of Illinois, which said court has exclusive original jurisdiction of said action, and caused the clerk of said State court to issue a summons against the said defendant and a writ of replevin, under which said last named writ the property described in said writ and declaration was seized by the officer of said court and delivered to the said plaintiff.

That said writs were made returnable to the June term of said court A. D. 1877, at which said term the said defendant appeared and filed his plea to said declaration.

33 The said defendant further shows that long after the filing of the said transcript of record in this court the said plaintiffs, to wit, at the May term, A. D. 1878, filed in the said circuit court of Cook County their replication to the said defendant's plea, and at said term of said State court prosecuted their said action to a final hearing, and such proceedings were thereupon had in said action that afterwards, to wit, at said May term, to wit, on the 5th day of June, A. D. 1878, the said defendant, by the consideration and judgment of the said circuit court of Cook County, recovered a judgment against the said plaintiffs for the return to him of the property described in said declaration and writ of replevin, being the same identical property described in the aforesaid transcript of record, and for his costs in said action as by the record and proceedings thereof still remaining in said circuit court of Cook County more fully appear, which said judgment is in full force, and un-

reversed, and unsatisfied, and this the said defendant is ready to verify by the record. Wherefore the said defendant prays judgment, if this court here will take jurisdiction and cognizance of the action aforesaid.

E. WALKER,
Attorney for Def't.

34 (Endorsed:) Filed Nov. 12, 1878. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 21st day of November, A. D. 1878, in the said October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

FREDERICK W. HUIDEKOPER, JOHN N. DENISON, and Thomas W. Shannon
vs.
CHARLES KERN.
} Replevin.

Now come the plaintiffs, by Henry Crawford, esq., their attorney, and the defendant, by Edwin Walker, esq., his attorney, and now comes on to be heard the demurrer of the plaintiffs to the plea to the jurisdiction herein, and, after hearing the arguments of counsel, the court sustains said demurrer, to which ruling of the court the defendant, by his said attorney, excepts, and the defendant, failing to make further answer herein, and electing to abide by his said plea, it is thereupon considered by the court that the plaintiffs have and retain possession of the goods and chattels replevied herein and described in the writ issued in this cause, as follows: About one thousand (1,000) tons of railroad iron, formerly in the track of the Chicago, Danville and Vincennes
35 Railroad, lying along what is called the Mud Lake track, near Twenty-fourth street, in the city of Chicago, Illinois; and the court finds the plaintiffs' damages to the sum of one cent. It is, thereupon, considered and adjudged by the court that the plaintiffs do have and retain possession of the said about one thousand tons of railroad iron, and that the plaintiffs have and recover of the defendant the said sum of one cent, their damages, together with their costs and charges in this behalf expended, amounting to the sum of dollars and cents, and that they have execution therefor.

And afterwards, to wit, on the 5th day of September, A. D. 1879, said defendant, by his solicitor, filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, Charles Kern, as principal, and Edwin Walker, as surety, are held and firmly bound unto Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison, in the sum of five hundred dollars ($500.00), for the payment of which, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 5th day of September, A. D. 1879.

36 Whereas the above-named Charles Kern, defendant, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit of Frederick W. Huinde-

koper, Thomas W. Shannon, and John M. Denison, plaintiffs, against Charles Kern, defendant, by the circuit court of United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named defendant, Charles Kern, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be null and void, otherwise the same shall remain in full force and effect.

EDWIN WALKER, [SEAL.]

Security approved.

THOMAS DRUMMOND.

Sept. 5, '78.

(Endorsed:) Filed September 5, 1879. Wm. H. Bradley, cl'k.

37 NORTHERN DISTRICT OF ILLINOIS, *set*:

William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Frederick W. Huidekoper et al. were the plaintiffs and Charles Kern was the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this 27th day of September, A. D. 1879, and of the Independence the one hundred and fourth year.

WM. H. BRADLEY, [SEAL.]
Clerk.

38 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between Frederic W. Huidekoper, John N. Dennison, and Thomas W. Shannon, plaintiffs, and Charles Kern, defendant, in an action of replevin, a manifest error hath happened, to the great damage of the said Charles Kern, as by his complaint appears, and it is being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October A. D. 1879, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of September, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

WM. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. Charles Kern, pl'ff in error, vs. Fred'k W. Huidekoper et al., def'ts in error. Writ of error.

39 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, in a certain cause wherein Frederick W. Huidekoper, Thomas W. Shannon and John M. Denison are plaintiffs and Charles Kern, sheriff, &c., defendant, to show cause, if any there be, why the judgment rendered in said cause in said court last mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Thomas Drummond this 5th of Sept., in the year of our Lord one thousand eight hundred and seventy-nine.

THOMAS DRUMMOND.

40 Served on me September 11, 1879.

HENRY CRAWFORD,
Attorney.

(Indorsed:) Supreme Court of the United States. Charles Kern vs. F. W. Huidekoper et al. Citation to October term, A. D. 1879.

(Indorsement on cover:) No. 538. Charles Kern, plaintiff in error, vs. Frederick W. Huidekoper, John N. Dennison, and Thomas W. Shannon. N. Illinois C. C. U. S. Filed 30 September, 1879.

OFFICE SUPREME COURT U. S.
FILED
NOV 26 1890
JAMES H. McKENNEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

CHARLES KERN,
Plaintiff in Error,

vs.

FREDERICK W. HUIDEKOPER, JOHN N. DENNISON AND THOMAS W. SHANNON,
Defendants in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

E. WALKER,
Attorney for Plaintiff in Error.

Beach, Barnard & Co, Legal Printers, 104 Randolph Street.

IN THE

SUPREME COURT OF THE UNITED STATES.

CHARLES KERN,
Plaintiff in Error,
vs.
FREDERICK W. HUIDEKOPER, JOHN N. DENNISON AND THOMAS W. SHANNON,
Defendants in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action of replevin brought by Frederick W. Huidekoper, John N. Dennison and Thomas W. Shannon in the Circuit Court of Cook County, at its May Term A. D. 1877, against Charles Kern for the possession of about one thousand tons of old railroad iron claimed to be wrongfully detained from the possession of the plaintiffs.

The declaration alleges, that the iron in controversy, about one thousand tons of old rails, was formerly in the track of the Chicago, Danville & Vincennes Railroad, but that it was then lying near what was called "Mud Lake Track" in the city of Chicago, and that it was of the value of eighteen thousand dollars ($18,000.)

The plaintiffs' claimed to be owners of said iron, and charged an unlawful detention by the defendant Kern.

The defendant, Kern, in his plea, alleges that he was the sheriff of the county of Cook, and that he held such iron

by virtue of a levy of two certain executions, against the Chicago, Danville & Vincennes R. R. Co., each issued by the Superior Court of the County of Cook; one in favor of the Bank of North America, and the other in favor of one John McCaffrey, for the aggregate sum of about eleven thousand dollars ($11,000.)

That by each of said writs, he was commanded, as such sheriff, that of the goods, chattels, lands and tenement in his county, of the said Chicago, Danville & Vincennes Railroad Company, he should cause to be made the sum of each of said executions.

That, as such sheriff, on or about the first day of May, A. D. 1877, the said writs being then in full force and unsatisfied, he took the said iron and detained the same in excution of said writs.

Plea further alleges, that the iron at the time of said levy and at the time of the commencement of this action, was the property of the said Chicago, Danville & Vincennes Railroad Company, and was subject to execution. At the July term of said State court, A. D. 1878, the plaintiffs filed a replication to said plea, alleging that said railroad iron, at the time of the levy, was the property of the plaintiffs, and not of the railroad company, as charged in the said defendant's plea.

The record further shows that the writ of replevin was issued on the 23d of May, A. D. 1877, and upon the same day was served by the coroner of said county, who received from the plaintiffs a statutory bond, and thereupon delivered to them the possession of the iron.

The summons in this action was made returnable at the next term of the court commencing on the third Monday of June.

On the 31st day of May, A. D. 1877, the plaintiffs filed in said court their bond and petition to remove said action

from the Circuit Court of Cook County, to the Circurt Court of United States for Northern District of Illinois.

On the second of June, the court denied the petition on the ground that it was prematurely presented and filed. At this date no narr. had been filed in the action. The defendant was not in court and was not required to appear until the third Monday in June. On the sixth day of July, the defendant filed his plea, and upon the same day the plaintiffs filed another petition for the removal of the cause to the United States Court, but before doing so, caused to be entered in said cause an order dismissing their petition filed therein, on the 31st of May, A. D. 1877. The petition for removal, of July sixth, was also denied by the court.

On the 27th of July, A. D. 1877, the plaintiffs filed a transcript of the record of said cause in the clerk's office of the Circuit Court of United States for the Northern District of Illinois.

On the 14th day of November following, upon motion of plaintiff's attorneys, this Court entered an order in said cause approving of the filing of said record, and on the fifth day of June, A. D. 1878, plaintiff's attorneys moved the court that an order be entered declaring that the cause had been removed from the Circuit Court of Cook County, and that the said Circuit Court of the United States had exclusive jurisdiction by reason of such removal, that the cause be placed upon the trial calendar of said court; or for such other order as might be necessary to fully declare the exclusive jurisdiction of said court over said cause.

The court sustained the motion and directed an order to be entered in accordance therewith. (Printed record, p. 12.) On the 26th day of June following, the defendant, by his attorney, entering special appearance for that purpose, filed a written motion for the dismissal of said action. (Printed Record, p. 13.) This motion was denied.

On the 12th day of November, A. D. 1878, the defendant, by leave of Court, filed his further plea. In this plea the defendant alleges that long after the filing of the said transcript of record in said Court, to wit, at the May Term, A. D. 1878, of said Circuit Court of Cook County, the plaintiffs appeared therein and filed their replication to the said defendant's plea, and that at the same term of said State Court, the plaintiffs prosecuted their said action of replevin to a final hearing, and that such proceedings were thereupon had in said action, that on the fifth day of June, A. D. 1878, the said defendant, by the consideration and judgment of said Circuit Court of Cook County, recovered a judgment against the plaintiffs for the return of the property described in said declaration and writ of replevin, and for costs, &c. (Printed Record, p. 15.)

To this plea the plaintiffs, on the 21st of November following, filed their demurrer, which was sustained, and thereupon the court entered judgment against the defendant for the return of the property in controversy and for plaintiff's damages. (Printed Record, p. 16.)

From this judgment the plaintiff in error has prosecuted his writ of error.

SUPREME COURT OF THE UNITED STATES.

Charles Kern,
Plaintiff in Error,
vs.
Frederick W. Huidekoper,
John N. Dennison, and
Thomas W. Shannon,
Defendants in Error.

ERRORS ASSIGNED.

Now comes the ~~appellant~~ plaintiff in error, Charles Kern, by E. Walker, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

FIRST. The court erred in overruling ~~appellant's~~ plaintiff in error's motion to dismiss said cause.

SECOND. That the court erred in sustaining demurrer to ~~appellant's~~ plaintiff in error's special plea.

THIRD. The court erred in rendering judgment against ~~appellant~~ plaintiff in error upon the demurrer.

FOURTH. The court had no jurisdiction over the subject matter of this action.

E. WALKER,
Att'y for Pl'ff in Error.

ARGUMENT.

This case, at the suggestion of Mr. Justice HARLAN, sitting as circuit judge, is submitted by stipulation with No. 854, under the twentieth rule.

While the two cases are entirely independent each of the other, it was thought that this submission would lessen the labor of the court as well as of the counsel. The questions, however, presented by the two records are entirely dissimilar, save the one question of jurisdiction.

This question I shall leave for argument in No. 854.

This action originated in the State court, where the defendants in error claimed the right of possession of the property in controversy, then in the custody of the plaintiff in error, as an officer of the State court, and in execution of its final process.

Under the practice act of the State of Illinois, regulating actions of replevin, the writ is issued upon the filing of a proper affidavit, and is executed upon the delivery to the officer, by the plaintiffs, of the necessary statutory bond.

In this action the affidavit was filed on the 23d day of May, A. D. 1878. Upon the same day the bond was executed and delivered to the officer, and the writ executed by the seizure of the property in controversy, and by its delivery to the plaintiffs.

The action being against the sheriff of Cook county, the writ was directed to, and was executed by, the coroner of the county.

On the 14th day of November, A. D. 1877, long after the attempted removal upon the *ex parte* motion of plaintiffs counsel, the court below caused to be entered of record its approval of the filing of such transcript, and upon the 5th day of June, A. D. 1878, still another order—that the exclusive

jurisdiction of said cause had been in said court since the 27th day of July, A. D. 1877. (Printed record, p. 12.)

We are at a loss to understand why these two orders were entered in the cause, and especially why the court should commit itself upon this jurisdictional question, upon a mere motion of the plaintiffs' attorneys, and without full hearing and argument.

This is more surprising, in connection with the fact as shown by the record in No. 854, that, at the time of the entry of the last order, the moving parties were prosecuting their action of replevin in the State court, and the cause was then on hearing.

We do not intimate that the purpose of this order was either to influence or control the action of the State court, yet it is a fact that a certified copy of such order was presented to the judge of the State court by the counsel for the defendants in error, during the progress of such trial, and the said court asked to stay its proceedings.

If this cause was properly removable under the acts of congress, it was put at issue in the Circuit Court on the 26th day of June, A. D. 1878, by the filing of a replication to the defendants' plea.

After the issues had been thus joined on the 12th day of November following, the plaintiff in error, by leave of court, filed his certain other plea. It recited that the action was originally commenced in the State Court at its June term, A. D. 1877, and that afterwards, in the May term of said court, nearly one year after the pretended removal, the defendants in error filed in said State Court, their replication to the plea, and that thereupon they prosecuted their said action to a final hearing, and that judgment was rendered in said State Court in said action, upon the merits, in favor of the said Kern, for the return of the property in contro-

versy; and that said judgment at the time of filing said plea, was in full force, unreversed and unsatisfied.

These facts are admitted by the demurrer, yet the court overruled said plea, and upon the plaintiff in error declining to plead further, entered a judgment in favor of the defendants in error.

This record then shows original jurisdiction in the State Court; the appearance in said court of all of the parties at its June term, A. D. 1877, and further appearance of said parties at the May term, A. D. 1878, a trial of the action, and judgment of the court; the State Court having, so far as this record shows, not only original, but full and complete jurisdiction over the parties and the subject matter of the action at the time of the entry of such judgment.

If this be true, then it follows that at the time of the filing of such plea on the 12th day of November, A. D. 1878, this controversy was *res judicata*.

In *Aurora City* v. *West*, 7 Wallace, 101, it is *held* "that a judgment in a court of concurrent jurisdiction, or "one in the same court, directly on the point, is, as a bar, "and conclusive between the same parties upon the same "matter directly in question in a subsequent action."

Also in *Russell* v. *Place*, 4 Otto, 606, it is *held* "that a "judgment of a court of competent jurisdiction, upon a "question directly involved in one suit, is conclusive as to "that question in another suit between the same parties."

But even if this plea was properly rejected upon demurrer, there was still a trialable issue, the ownership of the property was still in controversy, and it was error for the court to enter judgment against either party until that issue had been properly determined.

The plaintiff in error still claimed under his plea the right of possession of the property, and if the judgment

of the State Court could be properly disregarded, he was still in court defending his claim, and judgment should not have been entered against him as for default.

We therefore respectfully submit that there is substantial error in the record and proceedings for which the judgment should be reversed.

E. WALKER,
Attorney for Plaintiff in Error.

November 10, 1880.